Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 141

(T.D. 83-251)

Customs Regulations Amendment Relating to Entry of Cotton Fabrics

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to the requirement for additional invoice information for specified "cotton fabrics", by eliminating the use of a Customs form to furnish that information and allowing the use of a standardized commercial invoice for that purpose. This change will eliminate duplicative information and a Customs form, thus simplifying the procedure and lessening the reporting burden for importers.

EFFECTIVE DATE: January 3, 1984.

FOR FURTHER INFORMATION CONTACT: Herbert H. Geller, Duty Assessment Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5307).

SUPPLEMENTARY INFORMATION:

Background

Section 141.81, Customs Regulations (19 CFR 141.81), provides that, depending on the circumstances of each importation, either a special Customs invoice, a special summary invoice, or a commercial invoice must be presented for each shipment of merchandise imported into the United States at the time the entry documentation is filed with Customs.

Moreover, the invoices for certain classes of merchandise, specified in section 141.89(a), Customs Regulations (19 CFR 141.89(a)), *e.g.*, "cotton fabrics", classifiable under various item numbers in the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), must contain additional information set forth in detail in that section. Customs Form 5519, "Invoice Details for Cotton Fabrics and

Linens", was developed for furnishing the additional information required by section 141.89(a) in the case of the enumerated cotton fabrics.

As part of an ongoing program to align and simplify international trade documentation, the National Committee on International Trade Documentation (NCITD), a broad-based trade group, and Customs officials from the New York Customs Region developed a joint proposal for reporting cotton fabric details. The proposal, which was the subject of a notice of proposed rulemaking (NPRM), published in the Federal Register on November 19, 1982 (47 FR 52193), would allow the additional required information to be submitted on a commercial invoice, standardized in size, format, and information content, and would eliminate the use of Customs Form 5519 for that purpose. As stated in the NPRM, this change would eliminate duplicative information and a Customs form, thus simplifying the procedure and lessening the reporting and paperwork burden for importers.

Only two comments were received in response to the notice. Although the commenters favored the proposal, they recommended certain changes to improve the quality of information collected on the commercial invoice. These recommended changes are discussed below.

Discussion of Comments

1. *Comment*

The information collection areas identified as items 17 and 18, "Gross Weight" and "Measurement", respectively, should be redesignated as "Unit Price" and "Amount Extension", respectively. By doing this each line description would be correlated with its unit price and amount extension.

Response

Customs concurs and has made the recommended change.

2. *Comment*

The information collection areas identified as items 10 through 14 should be revised to conform with the Standard Master Form developed by NCITD to facilitate preparation of the invoice.

Response

The preparation and submission of a commercial invoice following the Standard Master format will be acceptable for Customs purposes. However, submissions prepared using invoices other than that aligned to the Standard Master will also be acceptable when the prescribed data is shown and identified as indicated in the final rule.

3. *Comment*

The information collection area identified as item 8, "Threads per sq. inch" should be modified to include "single threads per inch

in the warp", "single threads per inch in the filling" and, "total single threads per sq. inch."

Response

Customs concurs and has made the suggested change. This information is critical in determining proper textile and apparel categories and quotas. Customs records indicate that this information does appear on commercial invoices approximately 90 percent of the time, and it is the general practice for importers to order fabric by specifying single threads per inch in both the warp and filling. When this information is not shown, Customs has had to request the importer to supply it or perform an analysis of the fabric.

4. *Comment*

The information collection area identified as item 14 relating to "How Woven" should indicate the type of information required, and include the words "plain, eight or more harnesses, jacquard, swivel, lappet."

Response

Customs concurs and has made the suggested change.

5. *Comment*

The information collection area identified as item 15, "No. colors or kinds", should read, "No. colors or kinds in the filling."

Response

Customs concurs and has made the suggested change.

6. *Comment*

The information collection area identified as item 16, "Quantity," should indicate that the number of yards must be shown as well as the number of packages.

Response

Customs concurs and has made the suggested change.

7. *Comment*

Additional columns should be required for the unit price and net weight of each type of fabric.

Response

Unit price will be required (see response to comment 1 above, and information collection area identified on the commercial invoice in the appendix to this document as item 17). Net weight figures are available from other required information on the commercial invoice (see information collection area identified as item 9).

After careful analysis of the comments received, and further review of the matter, it has been determined to adopt the proposal with the changes discussed above. It has also been decided not to use an addendum to the commercial invoice as was proposed in the NPRM. After further review it is Customs opinion that the adden-

dum would in fact be a perpetuation of the Customs Form 5515. In addition, the addendum would be burdensome for a foreign seller or shipper to use. The addendum was not aligned to a standard commercial invoice, was not adaptable to automated production and would probably not be used in any event because most entries for merchandise covered by the proposal are single line entries. Rather than an addendum it is believed additional commercial invoices, when needed, would be preferable to all parties. Appended to this document is a sample of a commercial invoice with the changes noted above.

Executive Order 12291

As indicated in the proposed rule, this amendment does not meet the criteria for a "major rule" as defined by section 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this amendment because the rule will not have a significant economic impact on a substantial number of small entities.

Accordingly, it is certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that this rule will not have a significant economic impact on a substantial number of small entities.

Drafting Information

The principal authors of this document were Jesse V. Vitello and John E. Elkins, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 141

Customs duties and inspection, imports, invoices.

Amendment to the Regulations

Part 141, Customs Regulations (19 CFR Part 141), is amended as set forth below.

PART 141—ENTRY OF MERCHANDISE

Section 141.89(a), Customs Regulations, is amended by removing the last sentence of the eighth paragraph which relates to the use of Customs Form 5519 for collection of information about cotton fabrics and inserting, in its place, a new sentence which reads as follows:

§ 141.89 Additional information for certain classes of merchandise.

(a) * * *

* * * A standardized commercial invoice may be used for furnishing the information required above.

* * * * * * *

(R.S. 251, as amended, sections 481, 484, 624, 46 Stat. 719, 722, as amended, 759 (19 U.S.C. 66, 1481, 1484, 1624)).

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: November 6, 1983.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 1, 1983 (48 FR 54217)]

COMMERCIAL INVOICE

(1)

SHIPPER/ EXPORTER/ MANUFACTURER/ SELLER (2)

DOCUMENT NO. (3) | INVOICE DATE AND NO. (3) Purchase Date

OTHER REFERENCES (4)

CONSIGNED TO ORDER OF SHIPPER/ PORT AGENT/ BANK (5A)

BUYER (7)

SHIPPED TO (ULTIMATE CONSIGNEE) (5B)

POINT AND COUNTRY OF ORIGIN OF SHIPMENT (6)

NOTIFY PARTY/ INTERMEDIATE CONSIGNEE (A)

TERMS (9)
SALE
DELIVERY
PAYMENT
DISCOUNT/ INSTRUCTIONS
REMITTANCE ADDRESS
CURRENCY
OTHER

PIER OR AIRPORT (10)

EXPORTING CARRIER (VESSEL/ AIRLINE) (11) | PORT OF LOADING (12)

AIR/ SEA PORT OF DISCHARGE (13) | FOR TRANSSHIPMENT TO (14)

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS (16)	NO. OF PKGS. (15)	DESCRIPTION OF PACKAGES AND GOODS (18)	UNIT PRICE (19)	AMOUNT/ EXTENSION (20)
Case Marks Case No.	(16) No. of Pkgs. No. of Yards	(5) Style/Quality No. (7) Description of merchandise (6) Width (8) a. Single threads per sq. inch in the warp (8) b. Single threads per sq. inch in the filling (8) c. Total single threads per sq. inch (9) Weight per sq. yd. (oz.)	(17)	(18)

(10) Average yarn No.

(11) Yarn size in warp

(12) Yarn size in filling

(13) No. colors or kinds in the filling

(14) How woven (plain, eight or more harnesses, jacquard, swivel, or lappet)

Goods Total

Freight

Insurance

Packing

Commissions

Other (Specify)

Invoice Total ($)

(T.D. 83-252)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds), Customs Form 7605

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: November 25, 1983.

Name of principal and surety	Date term commences	Date of approval	Filed with district director/area director/amount
Hawaiian Airlines, Inc., P.O. Box 30008, Honolulu, HI; Industrial Indemnity Co.	Dec. 15, 1983	Nov. 10, 1983	Honolulu, HI $100,000

The foregoing principal has been designated a carrier of bonded merchandise.

BON-3-01

EDWARD B. GABLE, JR.,
Director,
Carriers, Drawback and Bonds Division.

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19 CFR Part 101

(T.D. 83-253)

Customs Regulations Amendments Relating to the Customs Field Organization

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by consolidating the ports of entry of Trout River, Chateaugay, and Fort Covington, New York, into a single port of entry with its headquarters at Trout River, New York. All three locations will remain open and fully functional. This change will eliminate duplication of port functions and permit better control of staffing resources without impairing services to area businesses or the general public. It will enable Customs to obtain more efficient use of its personnel, facilities, and resources.

EFFECTIVE DATE: January 3, 1984.

426-564 O - 83 - 2

FOR FURTHER INFORMATION CONTACT: Richard Coleman, Office of Inspection and Control, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8157).

SUPPLEMENTARY INFORMATION:

Background

On May 16, 1983, a notice of a proposal to consolidate three Customs ports of entry was published in the Federal Register (48 FR 21966). The ports, all located in the Northeast Customs Region, headquartered in Boston, Massachusetts, are located at Trout River, Fort Covington, and Chateaugay, New York. Interested parties were given until July 15, 1983, to submit comments with respect to consolidating the three ports into a single port of entry with its headquarters at Trout River. Forty-six comments were received in response to the notice, none of which favored the proposal.

Discussion of Comments

Eight comments were submitted by municipal officials from the affected area, who are under the mistaken impression that the consolidation would result in reduction or elimination of Customs presence at Chateaugay and Fort Covington. This is not the case. The administrative port functions will merely be consolidated in one office at Trout River. Operational aspects such as the entry of merchandise will continue as before at each location. Customs personnel will provide service at all three locations on a rotating basis.

The overwhelming majority of the comments discussed a perceived adverse impact on the Customs inspectors who will have to commute between the three ports of entry on a rotational basis. A Customs analysis of the required travel patterns for the eighteen affected inspectors has revealed that two would be significantly affected, ten would average approximately ten additional miles per day, and the remaining six would actually travel fewer miles than at present.

After consideration of all comments received and further review of the matter, it has been decided to adopt the changes as proposed. These changes will enable Customs to obtain more efficient use of its personnel, facilities, and resources, without impairment to area businesses or the general public.

Changes in the Customs Field Organization

Under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR, 1949-1953 Comp., Ch. II), and pursuant to authority provided by Treasury Department Order No. 101-5 (47 FR 2449), the ports of Trout River, Chateaugay, and Fort Convington, New York, are consolidated into one port with its headquarters at Trout River.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

AMENDMENTS TO THE REGULATIONS

1. To reflect this change, the list of Customs regions, districts, and ports of entry in Section 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by removing "Chateaugay" and "Fort Covington" under the column headed "Ports of entry" in the Ogdensburg, N.Y., Customs District. That column of section 101.3(b), is further amended by removing "Trout River (T.D. 56074)", and inserting, in its place, "Trout River, Chateaugay, Fort Covington, T.D. 83-——."

2. The list of Customs stations in section 101.4(c), Customs Regulations (19 CFR 101.4(c)), is amended by removing "Chateaugay" under the column headed the "Port of entry having supervision," opposite the entry for the Customs station of "Churubusco, N.Y.", and inserting, in its place, "Trout River, N.Y."

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to these amendments because the rule will not have a significant economic impact on a substantial number of small entities. There will be no reduction in Customs service as a result of this change.

Accordingly, it is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule will not have a significant economic impact on a substantial number of small entities.

EXECUTIVE ORDER 12291

Because this change relates to the organization of the Customs Service, pursuant to section 1(a)(3) of Executive Order 12291, it will not result in a regulation or rule subject to the Executive Order.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs

Approved: November 3, 1983.

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 1, 1983 (48 FR 54216)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Frederick Landis
James L. Watson
Bernard Newman
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Gregory W. Carman

Senior Judges

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Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 83-119)

AL TECH SPECIALTY STEEL CORPORATION; ARMCO, INC.; CARPENTER TECHNOLOGY CORPORATION; and CRICIBLE STAINLESS STEEL DIVISION OF COLT INDUSTRIES, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT and UGINE ACIERS AND INTSEL CORPORATION, INTERVENORS

Court No. 83-1-00118

Before MALETZ, *Senior Judge.*

Opinion and Order

(Dated: November 21, 1983)

Collier, Shannon, Rill & Scott (*David A. Hartquist, Paul C. Rosenthal* and *David L. Dick* on the briefs) for plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the briefs) for defendant.

Covington & Burling (*Harvey M. Applebaum* on the briefs) for intervenors.

MALETZ, *Senior Judge:* In this action plaintiffs, American producers of specialty steel, challenge the final results of an administrative review conducted by the Department of Commerce, International Trade Administration (ITA), pursuant to section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a) (Supp. IV 1980). *See* 48 Fed. Reg. 2,808 (1983). That review focused on a 1973 dumping finding involving stainless steel wire rods imported from France and produced by intervenors. The ITA determined that a *de minimis* dumping margin of 0.3% existed for the review period.

Plaintiffs have moved for review of the ITA's determination pursuant to rule 56.1 of the rules of this court. In their motion they take issue with two procedural aspects of the ITA's section 751 review. The first is the decision by the ITA not to conduct a cost-of-production investigation under section 773(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1677b(b) (Supp. IV 1980).[1] The other is the ITA's refusal to verify

[1] That section provides in part:

(b) *Sales at less than cost of production*

Whenever the administering authority [the ITA] has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales [were] made at less than cost of production—

* * * * * * *

such sales shall be disregarded in the determination of foreign market value.

information submitted by intervenors Ugine Aciers and Intsel Corporation (Ugine Aciers) in the course of the ITA's review.[2] The government has defended its actions through a cross-motion for judgment upon review of the administrative determination.

For the reasons that follow, the court is of the view that the showing by plaintiffs of home market sales below cost of production was insufficient to warrant a cost-of-production investigation by the ITA. However, the court agrees with plaintiffs' contention that the ITA should have verified the information submitted by Ugine Aciers in the course of the ITA's section 751 review. Accordingly, plaintiffs' rule 56.1 motion is granted in part and denied in part; the government's cross-motion is granted in part and denied in part; and the case is remanded to the ITA with instructions to verify the information supplied by Ugine Aciers during the instant section 751 review.

The court first considers plaintiffs' claim that there was reasonable grounds to believe or suspect that Ugine Aciers' home market sales were below its cost of production.

I

Section 773(b) of the Trade Agreements Act of 1979 provides that the ITA shall investigate a foreign manufacturer's cost of production "whenever [it] has reasonable grounds to believe or suspect that sales in the home market * * * have been made at prices which represent less than the cost of producing the merchandise in question * * *." 19 U.S.C. § 1677b(b). The phrase "reasonable grounds to believe or suspect" is not, of course, self-defining. In an effort to give content and meaning to those words, this court in *Connors Steel Co.* v. *United States,* 2 CIT 242, 527 F. Supp. 350 (1981), announced a general evidentiary threshold amounting to less than the probable cause needed to secure a search warrant. *Id.* at 248, 527 F. Supp. at 357. When that threshold is met, the ITA must conduct a cost-of-production inquiry. *Id.* at 249, 527 F. Supp. at 357–58.

While helpful here in some measure, this general evidentiary standard falls somewhat short of providing clear guidance dispositive of the myriad factual situations that will undoubtedly arise. There is, however, an instructive body of law stemming from the Supreme Court's decision in *Terry* v. *Ohio,* 392 U.S. 1 (1968), wherein courts have grappled with the slippery concept of "reasonable suspicion." The upshot has been the formulation of detailed guidelines for determining whether *vel non* such suspicion exists in a

[2] Section 776(a) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1677e(a) (Supp. IV 1980), provides in part:

> [The ITA] shall verify all information relied upon in making a final determination in an investigation. In publishing such a determination, the administering authority shall report the methods and procedures used to verify such information. If the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its determination, which may include the information submitted in support of the petition.

given case.[3] The teaching of *Terry* and its progeny is that in order for reasonable suspicion to exist there must be "a particularized and objective basis for suspecting" the existence of certain proscribed behavior, taking into account the totality of the circumstances—the whole picture. *United States* v. *Cortez,* 449 U.S. 411, 417 (1981); *United States* v. *Merritt,* 695 F.2d 1263, 1268 (10th Cir. 1982), *cert. denied,* 103 S. Ct. 1898 (1983). Elaborating on these criteria the Supreme Court explained in *Cortez:*

> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present * * *. First, the assessment must be based upon all of the circumstances. * * *
>
> The process does not deal with hard certainties, but with probabilities. * * * Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field * * *.
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual * * * is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry* v. *Ohio, supra,* said that "[t]his demand for specificity in the information upon which * * * action is predicated is [this Court's] *central teaching* * * *."

Id. at 418 (emphasis in original). *See also Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 320–21 (1978) (probable cause in the administrative law context is established by *specific* evidence).

In the present case, plaintiffs drew several items to the ITA's attention which taken together, they contend, should have given rise to a "reasonable suspicion" on the ITA's part that Ugine Aciers was selling stainless steel wire rods in France below its cost of producing such merchandise. The government and Ugine Aciers counter that not only was this information presented in an untimely fashion by plaintiffs, it was also insufficient to create such a suspicion.

Assuming for the present the timeliness of plaintiffs' submission, the court believes that the information presented by them was much too general in nature to arouse a reasonable suspicion of below-cost-of-production sales by Ugine Aciers in its home market.[4]

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[3] It is true that the requirements of reasonable grounds in the administrative law context are not as exacting as in the criminal law sense. *See, e.g., Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 320 (1978); *Weyerhaeuser Co.* v. *Marshall,* 592 F.2d 373, 377 (7th Cir. 1979); *Chicago Zoological Society* v. *Donovan,* 558 F. Supp. 1147, 1151 (N.D. Ill. 1983). Nevertheless, a crucial common thread runs through each area which provides a useful tool for demarcating the metes and bounds of section 773(b)'s "reasonable grounds to believe or suspect" standard: In both the administrative and criminal law contexts specific, particularized evidence is the touchstone. *See Marshall* v. *Barlow's, Inc.,* 436 U.S. at 320. *See generally* Rothstein, *OSHA Inspections After Marshall* v. *Barlow's, Inc.,* 1979 Duke L.J. 63.

[4] In this connection the court notes with concern the following sweeping statement by the government:

> That decision [not to conduct a cost-of-production investigation] should be deferred to by this Court because it is supported by substantial evidence in the administrative record. It is not for this Court to weigh the evidence and substitute its judgment for that of the Commerce Department in order to arrive at the result desired by plaintiffs.

Continued

The first two items plaintiffs referred to were a foreign steel industry press release entitled "Eurofer," and a European Commission paper. Those sources indicated that European steel producers had incurred significant increases in raw material and energy costs, but that prices had failed to keep pace. However, the Eurofer press release was a very general reference to costs for all European Community steel producers, lumping together both carbon and stainless steel manufacturers throughout the entire European Economic Community. *Cf. Donovan* v. *Federal Clearing Die Casting Co.*, 655 F.2d 793, 797 & n.9 (7th Cir. 1981) ("We need not belabor the point that all newspaper reports are not of sufficient reliability to form the basis of [a] probable cause determination" in the context of an OSHA search warrant application.). The European Commission paper, when it did refer to the special steel industry, referred to an average of all European special steel prices and costs—not French stainless steel, and not Ugine Aciers' stainless steel wire rod.

Plaintiffs next maintain that a series of antidumping and countervailing duty petitions filed in early 1982 against nine European and non-European producers of carbon steel should have alerted the ITA to below cost-of-production sales in France by Ugine Aciers. But allegations of sales below cost of production with respect to diverse producers of *carbon* steel have little if any relevance to an administrative review of sales by a French producer of *stainless* steel wire rod. In this same connection, plaintiffs assert that an antidumping petition containing below-cost-of-production-sales allegations filed against French producers of stainless steel sheet and strip should have caused the ITA to believe or suspect similar such sales by Ugine Aciers. Given that Ugine Aciers does not manufacture or sell stainless steel sheet or strip, the chain of inferences required to reach the conclusion suggested by plaintiffs is far too tenuous.

Quoting from two American trade papers, plaintiffs further claim that a characterization of Ugine Aciers in one of those papers as a "loss-making" operation, and a statement in the other that Ugine Aciers had suffered a $105 million loss, should have provided the ITA with reasonable grounds to believe or suspect less-than-cost-of-production sales of stainless steel wire rod. Be that as it may, the mere use of the adjective "loss-making" fails to show less-than-cost-of-production sales of a single product sold in a discrete market where the company to which the adjective was ap-

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A reviewing court will, of course, pay substantial deference to a magistrate's "reasonable grounds" determination, *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964), but this is so because of a magistrate's status as a neutral and detached judicial officer, not as a perhaps overzealous law enforcement agency. *Id.*; *Donovan* v. *Federal Clearing Die Casting Co.*, 655 F.2d 793, 798 (7th Cir. 1981). Whether the evidence presented to the ITA is sufficient to provide reasonable grounds to believe or suspect *is a question of law which this court must ultimately resolve. See United States* v. *Rubio*, 703 F.2d 1124, 1129 (9th Cir. 1983) (published in advance sheets, but withdrawn from bound volume pending rehearing); *United States* v. *Glen-Archila*, 677 F.2d 809, 813–14 n.7 (11th Cir.) ("it is for the court * * * ultimately to resolve whether * * * the legal standard for reasonable suspicion was met"), *cert. denied*, 103 S. Ct. 165 (1982); 19 U.S.C. § 1516a(b)(1)(A) ("The court shall hold unlawful any determination, finding, or conclusion found—* * * to be unsupported by substantial evidence, *or otherwise not in accordance with law.*" (Emphasis added)).

plied sold a vast range of products in markets around the world. *Cf. Federal Clearing Die Casting Co.*, 655 F.2d at 797 ("Mere journalistic prose is not the kind of underlying factual data upon which a magistrate can exercise [independent] judgment" in an OSHA administrative law context.). And as for the press statement regarding the $105 million loss, considering that Ugine Aciers is a highly diversified, world-wide exporter, evidence of a company-wide loss fails to adequately pinpoint below-cost-of-production sales of an individual product in one of the company's many markets.

The final factor on which plaintiffs rely—and the only evidence which is objective, specific and particularized—is based on the nonconfidential summary of Ugine Aciers' response to the ITA's review questionnaire. On the basis of those figures, plaintiffs speculate that there must have been below-cost sales in the French market during the review period because wire rod prices appeared to them to have remained stable when compared with prices from the summary in the prior review period. While specific and particularized, this is no evidence of sales below Ugine Aciers' cost of production. First of all, the summary did not represent actual prices. Rather, consonant with Commerce Department regulations, *see* 19 C.F.R. § 353.28(a)(1), that summary reflected prices in ranges with a plus-or-minus accuracy of ten percent. Second, in making their argument plaintiffs do not refer to the confidential submission of home market price information which was made available to them. That information indicates that at most Ugine Aciers' prices for most types of stainless steel wire rod sold in France remained stable between review periods, but that for several other types prices increased. Thus, even if specific and particularized, this evidence is much too thin to give rise to any reasonable suspicion of home market sales below cost of production.

The situation presented here is completely dissimilar from that in *Connors*. There, Connors constructed a steel trigger price which showed sales by the foreign manufacturer below that figure. It presented proof of its own costs of production to show, in conjunction with its claim of approximately the same efficiency of production, that the foreign manufacturer's sale price was below cost of production. Finally, it pointed to a statement appearing in the foreign manufacturer's own annual report that on various occasions the latter had accepted orders whose price did not cover fixed production costs. In *Connors*, then, the evidence was specific and particularized. Here, by sharp contrast, the evidence in the main is not. Based on the showing made by plaintiffs, the ITA could have had a belief or suspicion that was nothing more than an "inchoate and unparticularized suspicion or 'hunch,'" *Terry*, 392 U.S. at 27, a belief or suspicion which never could have ripened into one that was "reasonable." Plaintiffs' submission, considered as a whole, including the comparison chart of Ugine Aciers' prices from one review period to the next, is "simply too slender a reed to support"

the conclusion that there was reasonable grounds to suspect home market sales by Ugine Aciers below its cost of production. *See Reid* v. *Georgia,* 448 U.S. 438, 441 (1980).

Withal, the court is not insensitive to the burden on American manufacturers of demonstrating reasonable grounds to believe or suspect home market sales below cost of production. It should be clear that an American manufacturer cannot be required to make a showing based on confidential cost information within the exclusive control of its foreign competitor. Indeed, "it is unreasonable to expect a party to produce data directly from the costs of production of a competitor." *Connors,* 2 CIT at 247, 527 F. Supp. at 356. But, all in all, the evidence presented by plaintiffs is entirely too remote and generalized to give rise to a reasonable suspicion of below-cost-of-production sales by their French competitor. Accepting plaintiffs' contention would require straying into the realm of surmise.

In sum, absent a *specific* and *objective* basis for suspecting that a *particular* foreign firm is engaged in home market sales at prices below its cost of production, section 773(b)'s threshold requirement of "reasonable grounds to believe or suspect" has not been satisfied. *See Federal Clearing Die Casting Co.,* 655 F.2d at 797-98; *Weyerhaeuser Co.* v. *Marshall,* 592 F.2d 373, 377 (7th Cir. 1979).

The court turns next to plaintiffs' claim that the ITA was obligated to verify the information submitted to it by Ugine Aciers in the course of its section 751 review.

II

Pointing to section 776(a) of the Trade Agreements Act of 1979, 19 U.S.C. § 1677e(a), plaintiffs argue that the ITA was required to verify the information submitted by Ugine Aciers. The government seizes upon the language in section 776(a)—"verify all information relied upon in making *a final determination in an investigation*"—in support of its position that a section 751 review is a "proceeding," not an "investigation," and that the ITA is, therefore, not required to verify information submitted in such a "proceeding." Ugine Aciers, agreeing with the government, has nonetheless expressed its continued willingness to submit to verification.

The government argues that nowhere in section 751 did Congress refer to a section 751 review as an "investigation", nor did Congress provide for a "final determination" in the case of periodic reviews under that section.[5] By contrast, the government points out,

[5] Section 751, 19 U.S.C. § 1675 (Supp. IV 1980), provides in part:

§ 1675. Administrative review of determinations

(a) *Periodic review of amount of duty*

(1) *In general*

At least once during each 12-month period beginning on the anniversary of the date of publication of a * * * finding under the Antidumping Act, 1921, * * * the administering authority, after publication of notice of such review in the Federal Register, shall—

. . . . . .

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, * * *.

. . . . . .

Continued

in two sections of the Trade Agreements Act of 1979 Congress specifically provided for "final determinations" by the ITA during the phase between the commencement of an "investigation" and the publication of an antidumping duty order. *See* 19 U.S.C. §§ 1671d and 1673d (Supp. IV 1980). Accordingly, the government contends, a section 751 review "proceeding" does not literally fall within the verification obligation of section 776(a). In further support of its position that a section 751 review is a "proceeding," the government cites certain regulations in which the Commerce Department distinguishes between an "investigation" and a "proceeding," [6] the former describing a more narrow phase of the administrative process, the latter being all-encompassing.

However Commerce may have devised its "proceeding/investigation" distinction, it is nevertheless evident both from the statute and the legislative history of section 751 that a section 751 review results in "a final determination in an investigation," albeit periodic in nature.

First, the Senate Report on the Trade Agreements Act of 1979 explained:

> Subsection (a)(2) of section 516A would render *certain final determinations* subject to judicial review in the Customs Court at the instance of any "interested party" as defined in subsection (f)(3). These *final determinations* would be confined in subsection (a)(2)(A) to: (1) final determinations regarding the imposition of a countervailing or antidumping duty; (2) *periodic determinations of the amount of countervailing or antidumping duties to be imposed;* (3) determinations to suspend antidumping or countervailing duty investigations as the result of an agreement eliminating the injurious effects caused by the subsidies or sales at less than fair value; (4) determinations by the International Trade Commission resulting from the review of an agreement to eliminate the injurious effect of subsidized imports or sales at less than fair value.

S. Rep. No. 249, 96th Cong., 1st Sess. 247 (1979) (emphasis added), *reprinted in* 1979 U.S. Code Cong. & Ad. News 633. In addition, that same Senate Report, as well as the House Report, makes clear that a section 751 review represents the duty assessment phase of an antidumping duty investigation:

> This provision [section 751] expedites the administration of the assessment phase of antidumping and countervailing duty investigations.

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and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

[6] 19 C.F.R. § 353.11(b) (1982) provides:

An "investigation" refers to that time between the publication of a notice of initiation and the publication of the earliest of (1) a notice of termination, (2) a negative determination that has the effect of terminating the administrative proceedings; or (3) an Order.

19 C.F.R. § 353.11(a) (1982) provides:

A "proceeding" refers to that time from the filing of a petition (or publication of a notice of self-initiation under section 732(a) of the Act) until the publication of the earliest of: (1) A notice of termination, (2) a negative determination that has the effect of terminating the administrative proceedings; or (3) a notice of revocation of an Order.

S. Rep. No. 249, 96th Cong., 1st Sess. 80–81 (1979), *reprinted in* 1979 U.S. Code & Cong. Ad. News 466–67. *Accord* H.R. Rep. No. 317, 96th Cong., 1st Sess. 72 (1979). Thus, Congress viewed a section 751(a) review as one of several kinds of final determinations which may be made in the course of an antidumping duty investigation.[7]

Moreover, the statutory responsibilities of the ITA in a section 751 antidumping duty review are truly investigatory in nature. Section 751(a)(2), 19 U.S.C. § 1675(a)(2), requires the ITA to determine:

> (A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and
>
> (B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

This determination is more than a mere mathematical exercise. The data necessary for these computations must be obtained from the foreign manufacturer or importer. Section 751(a)(2) in fact contemplates just such data gathering as evidenced by its admonition to the ITA not to reveal "confidential information" when publishing the final results of its section 751 review in the Federal Register. *See* 19 U.S.C. § 1675(a)(2). This subsection, in substance, describes an agency investigation in the course of which a final determination will be made, the ITA's regulations to the contrary notwithstanding. *See Southeastern Community College* v. *Davis,* 442 U.S. 397, 411 (1979) ("Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.' ").

Besides relying on its own regulations, the government also contends that since plaintiffs have not attributed any error in the final results to lack of verification, nor have they suggested that the information submitted by Ugine Aciers was inaccurate, unreliable or untrustworthy, they cannot complain about non-verification. This argument is not only disingenuous, it completely misses the mark. For without verification *neither* the government nor plaintiffs—nor the court for that matter—is in a position to evaluate the accuracy or reliability of Ugine Aciers' submission and, ultimately, *that of the ITA's final results. This* is the point. It is not incumbent upon plaintiffs to either show or allege supple prevarication by Ugine Aciers in order to challenge the ITA's failure to verify. The government's reliance on the harmless error rule is, therefore, misplaced. *Compare The Timken Co.* v. *Regan,* 4 CIT —, 552 F. Supp. 47, 52 (1982) ("It is basic that procedural irregularities by an administrative agency are not per se prejudicial.").

[7] Indeed, section 776(a) refers to "*a* final determination," not "*the* final determination."

In the last analysis, to allow information submitted by a foreign manufacturer in the course of a section 751 review to escape verification would make a mockery of the Trade Agreements Act of 1979. One of the primary criticisms voiced by Congress when drafting that Act was the lax enforcement of the antidumping duty law by the Treasury Department, particularly when it came to assessment of duties:

> The Committee is very dissatisfied with the past record of the Secretary of the Treasury in assessing duties on entries subject to a dumping finding.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 69. It was this dissatisfaction which provided the impetus for transferring responsibility for administering the countervailing and antidumping duty laws from Treasury to Commerce. To now permit the ITA to conduct a section 751 review—the all important duty assessment phase of an antidumping duty investigation—without at the same time requiring it to verify information submitted to it in the course of such a review would be in effect to allow that agency to repeat the shortfalls of its predecessor. Not only was such a result not contemplated by Congress, it would be inimical to Congress' unequivocal direction that the ITA vigorously enforce the antidumping duty law. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 48 ("The Committee feels very strongly that both the countervailing and antidumping duty laws have been inadequately enforced in the past * * *. The provisions of this bill are intended to remedy this situation."). In the face of such a compelling congressional expression, pleas of administrative inconvenience based on an alleged "verification" burden ring hollow.

In short, it makes little sense to require detailed verification of all information submitted by foreign manufacturers during the less-than-fair-value investigation stage, but not to likewise require such verification when the agency actually assesses antidumping duties. It would stultify congressional purpose to say that the ITA has no duty to verify information submitted by a foreign manufacturer in the course of a section 751 review. *See Asahi Chemical Industry Co.* v. *United States*, 4 CIT —, 548 F. Supp. 1261, 1267 (1982) ("If a reading of a statute leads to a result which is 'contrary to the congressional intent and leads to absurd conclusions,' it is to be rejected."). Accordingly, considerations of sound and prudential administration of the antidumping duty law mandate verification of information by the ITA at this most critical phase.

III

For all the foregoing reasons, plaintiffs' motion for review of the administrative determination is granted in part and denied in part; the government's cross-motion for judgment upon review of the administrative determination is granted in part and denied in part;

and the case is remanded to the ITA with directions to verify the information submitted by intervenors in the course of the agency's latest section 751 review.

(Slip Op. 83–120)

AL TECH SPECIALTY STEEL CORPORATION; ARMCO, INC.; CARPENTER TECHNOLOGY CORPORATION; and CRUCIBLE STAINLESS STEEL DIVISION OF COLT INDUSTRIES, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT and UGINE ACIERS AND INTSEL CORPORATION, INTERVENORS

Court No. 83-1-00118

Before MALETZ, *Senior Judge.*

Opinion and Order

(Dated: November 21, 1983)

Collier, Shannon, Rill & Scott (*David A. Hartquist, Paul C. Rosenthal* and *David L. Dick* on the briefs) for plaintiffs.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Velta A. Melnbrencis* on the briefs) for defendant.

Covington & Burling (*Harvey M. Applebaum* on the briefs) for intervenors.

MALETZ, *Senior Judge:* Plaintiffs have moved for a preliminary injunction pursuant to rule 65 of the rules of this court to enjoin *pendente lite* the liquidation of entries of stainless steel wire rods entered by intervenors Ugine Aciers and Intsel Corporation (Ugine Aciers). That merchandise is the subject of an outstanding dumping finding issued in 1973, *see* 38 Fed. Reg. 9,094 (1973), which was administratively reviewed by the Department of Commerce, International Trade Administration (ITA), under section 751(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a) (Supp. IV 1980). *See* 48 Fed. Reg. 2,808 (1983). Plaintiffs now seek injunctive relief pending resolution of their judicial challenge to that section 751 review.

In order to prevail on a motion for a preliminary injunction, plaintiffs must show (1) that they will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all the parties favors petitioners. *Zenith Radio Corp.* v. *United States,* 710 F.2d 806, 809 (Fed. Cir. 1983). *See also S.J. Stile Assoc., Ltd.* v. *Snyder,* 646 F.2d 522, 525 (CCPA 1981); *The Timken Co.* v. *United States,* 6 CIT —, 569 F. Supp. 65, 68 (1983). Considering for the moment the second of these four criteria, in their complaint plaintiffs have taken issue with two alleged procedural irregularities in the ITA's section 751 review. In an opinion promulgated this day the court has addressed each of those challenges, ruling for plaintiffs on an

issue involving information verification under section 776(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677e(a) (Supp. IV 1980). *See AL Tech Specialty Steel Corp.* v. *United States,* Slip Op. 83-119 (Nov. 21, 1983).[1]

While in a strictly technical sense plaintiffs have now prevailed on the "merits" of their complaint, they have not done so in the more refined and ultimate sense of that term. For plaintiffs have yet to begin their attack on the substantive aspects of the ITA's section 751 review—in this court's view, the "true" merits. This is quite understandable, naturally, since without verification of the information submitted by Ugine Aciers it is literally impossible for plaintiffs to meaningfully challenge the substance of the ITA's section 751 results. No one can know upon what those results are predicated absent such verification.

The present action is thus merely a prelude. It certainly takes little prescience to predict, of course, that plaintiffs will launch a direct attack on the ITA's final results following the verification process, contingent upon just what that verification reveals. In the meantime, however, the court is faced with the unusual situation of being totally unable to make any prognostication as to the likelihood of plaintiffs' ultimate success. But it is also patently clear that plaintiffs will suffer irreparable harm if liquidation of those entries occurring during the review period is not enjoined. Insofar as irreparable harm is concerned, the Federal Circuit noted in its recent *Zenith* opinion that:

> Without a preliminary injunction, all of the entries occurring during the review period will be liquidated immediately, with dumping duties assessed in accordance with the margin set by the review determination. This result is required, in the absence of a preliminary injunction, by two sections of the Trade Agreements Act of 1979 [19 U.S.C. §§ 1516a(e) and (c)(1) (Supp. IV 1980)].
>
> * * * * * * *
>
> The statutory scheme has no provision permitting reliquidation in this case or imposition of higher dumping duties after liquidation if Zenith is successful on the merits. Once liquidation occurs, a subsequent decision by the trial court on the merits of Zenith's challenge can have no effect on the dumping duties assessed on entries of television receivers during the '79–'80 review period. * * * [Zenith] has a strong, continuing, commercial-competitive stake in assuring that its competing importers will not escape the monetary sanctions deliberately imposed by Congress. Defeat of that strong congressionally recognized competitive interest and the abrogation of effective judicial review are sufficient irreparable injury here.

[1] In that opinion the court upheld the ITA's decision not to undertake a cost-of-production investigation under 19 U.S.C. § 1677b(b) (Supp. IV 1980), but held that the ITA had a duty under 19 U.S.C. § 1677e(a) (Supp. IV 1980) to verify information submitted by intervenors in the course of its section 751 review. The case has been remanded to the ITA for verification of that information.

Id. at 810. In the present case plaintiffs are precisely circumstanced as was Zenith relative to entries occurring during the section 751 review period—absent an injunction, those entries will be liquidated immediately, thereby frustrating plaintiffs' right to judicial review in connection with those entries. Therefore, to that extent unless liquidation is enjoined, plaintiffs will forever lose their statutory right to challenge in this forum any errors in the ITA's final results attributable to the failure of the ITA to verify the information submitted by Ugine Aciers. More importantly, such liquidation will oust this court of jurisdiction vis-a-vis those entries.

Given these circumstances, the court believes that the most appropriate vehicle for preserving its jurisdiction and, concomitantly, plaintiffs' judicial review rights, is an injunction issued pursuant to the All Writs Act, 28 U.S.C. § 1651(a) (1976).[2] *See Alberta Gas Chemicals, Inc.* v. *United States,* 85 Cust. Ct. 122, 125, C.R.D. 80-13, 496 F. Supp. 1332, 1335 (1980). The court is led to this conclusion by two decisions of the Supreme Court involving the All Writs Act. The first is *FTC* v. *Dean Foods Co.,* 384 U.S. 597 (1966), where the Court noted:

> [D]ecisions of this Court "have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. * * * Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action * * * ." *Arrow Transp. Co.* v. *Southern R. Co.,* 372 U.S. 658, 671, n.22 (1963).

Id. at 604. the court finds even more compelling the supreme Court's further observation in the All Writs context that:

> If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made.

Scripps-Howard Radio, Inc. v. *FCC,* 316 U.S. 4, 10 (1942). On the strength of these pronouncements, the court is firmly convinced that in the exercise of its sound discretion issuance of an injunction under the All Writs Act is appropriate here.

Accordingly, it is hereby ordered:

1. That defendant be, and it hereby is, restrained and enjoined from liquidating any and all entries of the merchandise covered by the final results of administrative review, a notice of which was published on January 21, 1983, in 48 Fed. Reg. 2,808; and

2. That unless sooner modified or vacated for good cause shown this order shall expire *ex proprio vigore* thirty days after publica-

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[2] The All Writs Act provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necesary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

tion in the Federal Register of notice of defendant's redetermination.

(Slip Op. 83-121)

UNITED STATES, PLAINTIFF *v.* KEITH W. ATKINSON, and ST. PAUL FIRE & MARINE INSURANCE COMPANY, DEFENDANTS

Court No. 82-12-01742

Before BOE, *Judge.*

Memorandum Opinion

[Plaintiff's motion for summary judgment, granted; defendant's, St. Paul Fire and Marine Insurance Company motion for judgment on the pleadings, denied; defendant's, St. Paul Fire and Marine Insurance Company, cross claim against the defendant, Keith W. Atkinson, dismissed without prejudice.]

(Decided November 21, 1983)

J. Paul McGrath, Assistant Attorney General; (*Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch and *Michael P. Maxwell* on the briefs), for the plaintiff.

Glad, White & Ferguson (*Robert Glenn White* on the briefs), for the defendants.

BOE, *Judge:* In the above-entitled action, plaintiff has filed a motion for summary judgment to collect $13,700 in liquidated damages, jointly and severally, from named defendants Keith W. Atkinson and St. Paul Fire and Marine Insurance Company (hereinafter "St. Paul"). Defendant St. Paul in response to this motion contends that:

1. There are genuine issues of material fact yet to be tried or otherwise established, and
2. Plaintiff has not complied with applicable and controlling statutes and regulations, and
3. The plaintiff has failed to state a claim upon which relief can be granted in that its claim is barred by the statute of limitations.

Notwithstanding its contention that genuine issues of material fact exist which St. Paul asserts in opposition to plaintiff's motion for summary judgment, St. Paul cross moves for judgment on the pleadings. St. Paul predicates its motion on the grounds that the undisputed facts appearing from the pleadings entitle it to judgment.

St. Paul has further filed a cross claim against Atkinson to compel payment and for indemnity for any monies collected by the plaintiff in this action.

The facts alleged by the plaintiff and admitted by the defendant in its answer are set forth in pertinent part:

Defendant St. Paul, as surety, and Atkinson, as principal, executed, and delivered to plaintiff on or about February 10, 1975 an Im-

mediate Delivery and Consumption Entry Bond covering "an application dated January 29, 1975, for special permit to land and deliver immediately certain articles expected to arrive at the port of Portland, Oregon . . . ." Under the terms of the bond, Atkinson and St. Paul jointly and severally guaranteed to pay liquidated damages to the District Director of Customs if the principal did not timely redeliver the imported merchandise after a proper demand by Customs.

On February 12, 1975, Atkinson entered three automobiles into the United States and made a statement maintaining that they conformed with applicable Federal Motor Vehicle Safety Standards. The Office of Standards Enforcement notified Atkinson on February 28 and June 19, 1975 that the aforementioned statement was not acceptable to the Department of Transportation.

The Customs Service mailed a Notice of Redelivery to Atkinson on December 14, 1976, ordering him to redeliver the automobiles to Customs custody within five days. Atkinson never redelivered the automobiles.

On December 20, 1976, and February 22, March 7 and March 24, 1978, the District Director's office mailed demands for payment of liquidated damages in the amount of $13,700 to Atkinson at his last known address. A Customs Service Agent personally served defendant Atkinson with a copy of the notice on February 27, 1978.

Atkinson filed a petition for relief with the District Director of Customs on April 24, 1978. The District Director agreed to mitigate the full claim to $3,000 provided that amount was paid within thirty days. When neither Atkinson nor St. Paul paid the mitigated amount, Customs sent a formal bill for the full amount of liquidated damages to the principal on November 24, 1978.

By letters of July 18, 1979, and October 20 and December 27, 1981, Customs attempted unsuccessfully to collect the liquidated damages from defendant St. Paul. Plaintiff brought this action to recover liquidated damages on the surety bond on December 17, 1982.

A motion for summary judgment may be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(d) of the Court of International Trade Rules. In its opposition to plaintiff's motion St. Paul contends that genuine issues of material fact exist and proceeds to assert facts raising defenses not previously pleaded in its answer to plaintiff's complaint.

St. Paul claims that the Customs Service "has failed to comply with applicable and controlling statutes and regulations," including:

1. 19 C.F.R. § 113.52.
2. 19 C.F.R. § 141.113(b), (f).
3. 19 C.F.R. §§ 172.1–.2.

The defense of failure to comply with regulations is considered an affirmative defense. *Dorsey and Co.* v. *Banque National de la Republic D'Haiti,* 393 F. Supp. 893, 897-98 & n.6 (S.D.N.Y. 1975). *See St. Paul Fire & Marine Insurance Co.* v. *United States,* 370 F.2d 870 (5th Cir. 1967). If St. Paul desired to assert facts which put plaintiff's failure to follow its own regulations in issue, it should have so pleaded in its answer. "In pleading to a preceding pleading, a party shall set forth affirmatively * * * illegality, laches, * * * statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Rule 8(d) of the Court of International Trade Rules. The failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case. 5 C. Wright and A. Miller, *Federal Practice and Procedure,* § 1278 (1969). *See Trio Process Corp.* v. *L. Goldstein's Sons, Inc.,* 461 F.2d 66 (3d Cir. 1972); *RCA* v. *Radio Station KYFM, Inc.,* 424 F.2d 14 (10th Cir. 1970); *Albee Homes, Inc.* v. *Lutman,* 406 F.2d 11 (3d Cir. 1969); *Roe* v. *Sears, Roebuck & Co.,* 132 F.2d 829 (7th Cir. 1943).

Defendant has not sought to institute these affirmative defenses by pursuing the remedy available to it by moving at any time prior to judgment for leave to amend its answer under Rule 15(a) of this court. Counsel for St. Paul in reply to plaintiff's opposition to the motion for judgment on the pleadings insists on the right to inital-ly assert the affirmative defenses in question in its motion for judgment on the pleadings and in its response to plaintiff's motion for summary judgment. It appears that counsel endeavors to satisfy the plaintiff's objections by stating in its reply that "the appropriate pleading should be deemed amended." However, established rules and principles of pleading and practice cannot be the subject of modification or disregard by litigants. A statement that pleadings may be deemed amended is not a substitute in an action of this character for a motion directed to this court for allowance to amend the answer stating the specific manner and form of the intended amendment. Rule 15(a) of the Court of International Trade Rules.[1] Since these defenses accordingly are excluded from this action, the facts relating thereto alleged in defendant's response to plaintiff's motion for summary judgment do not constitute genuine issues to be tried.

Defendant St. Paul has raised two affirmative defenses in its answer:

1. The statute of limitations, and
2. The failure to state a claim upon which relief can be granted.

Both defenses are predicated upon 28 U.S.C. § 2415 which states:

> [E]very action for money damages brought by the United States on an officer or agency thereof which is founded upon

[1] The right of the plaintiff under the rules of court to respond to a motion for allowance to amend cannot be abrogated by the defendant's assertion in a reply that its prior pleading might be deemed amended.

> any contract express or implied by law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues * * *

The agreed facts indicate that the defendants executed the Immediate Delivery Consumption Entry Bond on February 10, 1975, took custody of the subject merchandise in the United States on February 12, 1975, and failed to redeliver the merchandise within five days of the mailing of the redelivery order (December 19, 1976). Plaintiff initiated this action by the filing of a summons and complaint on December 17, 1982.

When the defendants signed the bond in question, they entered into a contract with the government to redeliver the subject merchandise upon the request of Customs. Defendants breached the bond agreement when they failed to so redeliver the merchandise to Customs. It is a general rule that "the statute of limitations begins to run on the date that a cause of action for breach accrues, which is ordinarily the time of the breach of the agreement." *Schmidt* v. *McKay,* 555 F.2d 30, 34 (2d Cir. 1977). *See Sven Salem AB* v. *Jacq. Pierot, Jr. & Sons, Inc.,* 559 F. Supp. 503 (S.D.N.Y. 1983); *U.S.* v. *Cardinal,* 452 F. Supp. 542 (D. Vt. 1978).

The cause of action against the defendants in this case accrued on December 19, 1976. The summons and complaint filed on December 17, 1982, accordingly, was within the six year limitation period provided by 28 U.S.C. § 2415.

Customs Regulation 19 C.F.R. § 141.113(g) provides for the assessment of liquidated damages when an importer fails to comply with a demand to redeliver merchandise. Defendant St. Paul has admitted that it bound itself to pay liquidated damages to the District Director of Customs if the merchandise was not timely redelivered to Customs after a proper demand was made to the principal. The facts alleged in plaintiff's complaint and admitted by answer establish the liability of St. Paul for the liquidated damages sought by the plaintiff. *See United States* v. *Dieckerhoff,* 202 U.S. 302 (1906).

Defendant St. Paul couples a "Motion for Judgment on the Pleadings" with its "Statement Of Material Facts Of Which There Are Genuine Issues To Be Tried." Asserting in its cross motion that the undisputed facts appearing from the pleadings entitle it to judgment as a matter of law, St. Paul reiterates the identical affirmative defenses maintained in its response to plaintiff's motion for summary judgment. The reassertion of the affirmative defenses in St. Paul's cross motion, predicated upon the existence of undisputed facts appearing from the pleadings, can receive no more favorable reception by the court than in its previous determination herein with respect to those identical defenses in St. Paul's opposition to plaintiff's motion for summary judgment.

Plaintiff states in its motion for summary judgment that it did not serve process on Atkinson. Consequently, Atkinson has not been made a co-defendant in this action. It follows that the United

States may not have summary judgment, jointly and severally, against St. Paul and Atkinson. The judgment sought in this action can only lie against St. Paul.

St. Paul, however, has filed a cross claim against Atkinson to compel payment and for indemnity for any monies collected by the plaintiff. The rules of this court permit cross claims only against co-parties to an action. Rule 13(f) of the Court of International Trade Rules. Since Atkinson is not a party to this action, he is not subject to a cross claim by St. Paul. Nor can Atkinson be deemed to have been joined as a third party defendant.

The rules of this court provide that a defending party, as a third party plaintiff, may "cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Rule 14(a) of the Court of International Trade Rules.

Counsel for St. Paul has attached three certificates of service to its purported cross claim stating that Atkinson had been served *by mail* at three different addresses on January 20, 1983. Rule 4(d)(7) of this court permits service in a manner prescribed by the law of the state in which service is made. The State of California, situs of service, allows service by mail. "A summons may be served by mail as provided in this section." *Cal. Civ. Proc. Code* § 415.30 (West 1973). This statute, however, requires the person served to return an acknowledgment of receipt.[2] "No judgment can be rendered against the defendant on the basis of mere mailing of a summons, for proof of service requires the receipt of the acknowledgment." 21 *Hastings L. J.* 1281, 1288 (1970). *See Cal. Civ. Proc. Code* § 417.10 (West 1973). Defendant St. Paul's proof of service does not include any acknowledgment of a receipt of summons. Accordingly, this court has not acquired jurisdiction over the person of Atkinson, necessary to a consideration of St. Paul's claim in reimbursement against him.

Plaintiff has requested in his motion for summary judgment preas well as postjudgment interest in accordance with the rate provided in 28 U.S.C. § 2644. As the government correctly acknowledges, the provisions in 19 U.S.C. § 580 are inapplicable for the reason that this action is to recover liquidated damages, not duties. 28 U.S.C. § 2644 specifically relates to the award of interest upon monetary relief received "in a civil action in the Court of International Trade under section 515 of the Tariff Act of 1930." This court is not of the opinion that the provisions of the foregoing statute are applicable to a monetary judgment received in an action brought under 28 U.S.C. § 1582.[3]

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[2] "Service of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of summons is executed, if such acknowledgment thereafter is returned to the sender." *Id.* § 415.30(c). "If service is made by mail pursuant to Section 415.30, proof of service shall include the acknowledgment of receipt of summons in the form provided by that section or other written acknowledgment of receipt of summons satisfactory to the court." *Id.* § 417.10(a).

[3] The court recognizes the decision made in *United States* v. *Goodman*, 6 CIT —, Slip Op. 83-92 (September 13, 1983) but is not inclined to follow the *discretion* utilized by the court in that decision in applying section 2644.

Congress, however, in 28 U.S.C. § 1961 has mandated a general interest provision applicable to all federal district courts. Since no other comparable general interest provision has been specifically enacted for this court, the statutory interest rate provided in 28 U.S.C. § 1961 properly may be utilized in this action upon the award of a monetary judgment. *See United States* v. *Servitex, Inc.*, 3 CIT 67 (1982).

No specific statute provides for the recovery of prejudgment interest in an action of this character. "In the absence of a statutory provision the award of prejudgment interest is in the discretion of the court." *Payne* v. *Panama Canal Co.*, 607 F.2d 155, 166 (5th Cir. 1979). *See United States* v. *California State Board of Equalization*, 650 F.2d 1127 (9th Cir. 1981). The need to compensate an injured plaintiff is the major factor in determining whether prejudgment interest should be awarded. *Payne*, 607 F.2d at 166. Since any injury to the plaintiff is in good measure related to its own laxness in initiating this action, fairness does not dictate the granting of prejudgment interest to the plaintiff.

By reason of the foregoing the court determines that a judgment should be entered herein providing:

1. That plaintiff's motion for summary judgment against the defendant St. Paul be granted and that the plaintiff, accordingly, be granted judgment against the defendant St. Paul in the sum of $13,700 together with interest thereon from and after the date of entry of this judgment at the rate of interest provided in 28 U.S.C. § 1961.

2. That the motion for judgment on the pleadings of the defendant St. Paul be denied.

3. That the cross claim of the defendant St. Paul against Keith W. Atkinson be dismissed, without prejudice, for lack of jurisdiction over the person Atkinson.

Let judgment be entered accordingly.

(Slip Op. 83-122)

BORDER BROKERAGE CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 75-9-02194

Before FORD, *Judge.*

Harvesting Equipment

[Judgment for plaintiff.]

(Decided November 22, 1983)

George R. Tuttle, P.C. (*Stephen S. Spraitzar* at the trial and on the brief and *George R. Tuttle* at the trial) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Robert H. White* at the trial), for the defendant.

FORD, *Judge:* This action is before the Court for determination of the proper classification of certain merchandise described on the invoices as "Madill type 071" Skidder towers or components thereof.[1] They were classified under item 664.10, Tariff Schedules of the United States, as modified by T.D. 68–9, and assessed with duty at 5.5 perceent ad valorem. Said item provides for "elevators, hoists, winches, cranes, jacks, pulley tackle, belt conveyors, and other lifting, handling, loading or unloading machinery, and conveyors, all the foregoing and parts thereof not provided for in item 664.05."

Plaintiff contends the imported merchandise is used for the harvesting of trees, and as such entitled to entry free of duty under item 666.00, TSUS, as agricultural implements. In *United States* v. *Border Brokerage Co.,* 2 CIT 326 (1981) *aff'd, United States* v. *Border Brokerage Co.,* Appeal 82–15, —F.2d —(Fed. Cir. 1983), the Court held following the decision in *Norman G. Jensen, Inc.* v. *United States,* 76 Cust. Ct. 42, C.D. 4634; 408 F. Supp. 1379 (1976) *aff'd, United States* v. *Norman G. Jensen,* 64 CCPA 51, C.A.D. 1183, 550 F.2d, 662 (1977) that the harvesting of trees constituted an agricultural pursuit, and merchandise used for such purposes to be within the provision for agricultural implements as provided for in item 666.00, TSUS.

Certain portions of the record in 2 CIT 326, *supra,* were incorporated in the instant case as well as six exhibits. The matter was set for trial in Portland, Oregon, and plaintiff introduced the testimony of four witnesses and fourteen exhibits were received on its behalf. Defendant offered the testimony of one witness and introduced two exhibits.

After the filing of plaintiff's brief, defendant has consented to entry of judgment in lieu of filing a brief. In view of the foregoing, judgment will be entered for plaintiff.

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[1] Entry No. 113855—1 only Madill type 071, serial No. 03925, five drum skidder tower complete with 49' seamless tube spar with fairleads, three guyline blocks and three hydraulic guyline winches. (Less undercarriage); Entry No. 114045—1 only Madill five drum skidder tower model 071, serial No. 03926, complete with 49' seamless tube spar with fairleads, three hydraulic guyline winches and controls. (Less undercarriage); Entry No. 117215—1 only Madill type 071, serial No. 21962, five drum skidder tower, three hydraulic guyline winches, instrument panel and hydraulic controls and operators' cab. (Less undercarriage); Entry No. 117215—1 only Madill type 071, serial No. 21961, five drum skidder tower, three hydraulic guyline winches, instrument panel and hydraulic controls and operators' cab. (Less undercarriage); Entry No. 122148—1 only Madill Model 071 spar tube complete with fairleads and sheaves installed. (Less guyline blocks and straps).

(Slip Op. 83–123)

SPECIAL COMMODITY GROUP ON NON-RUBBER FOOTWEAR FROM BRAZIL, AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS, PLAINTIFF *v.* THE HONORABLE MALCOLM BALDRIDGE, SECRETARY OF COMMERCE OF THE UNITED STATES and, THE HONORABLE DONALD T. REGAN, SECRETARY OF THE TREASURY OF THE UNITED STATES and THE HONORABLE WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, DEFENDANTS

Court No. 83–3–00458

Before CARMAN, *Judge.*

Memorandum Opinion and Order

[Plaintiff's applications denied; Defendant's cross-motion to dismiss granted.]

(November 23, 1983)

Plaia, Schaumberg, & Dekieffer, Chartered, (Herbert C. Shelley on the motion) for the plaintiff.

J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch; (*Velta Melnbrencis* on the motion) for the defendants.

INTRODUCTION

CARMAN, *Judge:* In this action, plaintiff seeks, among other things, a writ of mandamus to compel the Secretary of the Treasury and the Commissioner of Customs to liquidate certain entries of non-rubber footwear imported from Brazil. Plaintiff also moves for a preliminary injunction to enjoin the Secretary of Commerce (a) from issuing a final determination in an annual administrative review of a countervailing duty order under section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a) (1982), covering January 4, 1980 to December 31, 1980 entries of certain non-rubber footwear from Brazil; (b) from directing the United States Customs Service (Customs) to assess any countervailing duties on those entries greater than the amount already deposited with Customs as estimated countervailing duties; and, (c) from conducting a further administrative review of such entries from January 1, 1981, through September 11, 1981. Defendant cross-moves to dismiss for lack of jurisdiction and failure to state a claim as to which relief may be granted.

The facts in this case are not in issue. In September 1974, a countervailing duty order was issued covering certain non-rubber footwear from Brazil. 39 Fed. Reg. 32,903 (1974). On January 4, 1980, Customs published a notice in the Federal Register suspending liquidation of all entries of non-rubber footwear from Brazil and requiring the deposit of an estimated countervailing duty at the rate of 1 percent on all future entries. 45 Fed. Reg. 1013 (1980) Plaintiff members continued to deposit estimated countervailing duties for entries in the amount of 1 percent pursuant to the notice of January 4, 1980. The Department of Commerce (Commerce, which had

assumed the duties of administering the countervailing duty laws from the Treasury Department, indicated on March 9, 1983, *see* 48 Fed. Reg. 9901 (1983), that it had conducted a preliminary administrative review and had preliminarily determined that net subsidies on exports from December 7, 1979, through December 31, 1979, were 4.77 percent and that net subsidies on exports from January 1, 1980 to December 31, 1980 were 3.48 percent. *Id* at 9903. The Department of Commerce has not indicated when the final administrative review for 1980 entries will be completed.[1] Commerce has not indicated whether the net amount of the bounty paid or bestowed upon non-rubber footwear from Brazil will be higher or lower than the 1 percent ad valorem rate that has been collected as estimated countervailing duties upon entry.

Plaintiff commenced this action on March 30, 1983, more than 3 years after the publication of notice of January 4, 1980, suspending liquidation. The plaintiff asserts that, pursuant to 19 U.S.C. § 1504 (1982), all entries must be liquidated within 1 year from the date of entry unless, among other reasons, liquidation is suspended as required by statute or court order.[2] Plaintiff also claims that this court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (Supp. V 1981),[3] since the subject matter of this action arose out of 19 U.S.C.

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[1] The International Trade Commission (ITC) apparently informed the Commerce Department on October 29, 1981, that it had received a request for an injury determination as provided in section 104(b)(1) of the Trade Agreements Act of 1979, 19 U.S.C. § 1671 note (1982) with regard to non-rubber footwear from Brazil. Commerce was to suspend the liquidation of entries made on or after October 29, 1981, and collect estimated countervailing duties pending the determination of the ITC. The ITC determined on May 24, 1983, that an industry in the United States would not be materially injured or threatened with material injury, nor would the establishment of an industry in the United States be materially retarded by reason of imports of certain non-rubber footwear from Brazil covered by the outstanding countervailing duty order if the order were to be revoked. *See* 48 Fed. Reg. 24,796 (1983). Commerce, pursuant to section 104(b)(4) of the Trade Agreements Act of 1979, 19 U.S.C. § 1671 note, and as the administering authority, presumably will revoke the countervailing duty order in effect with regard to non-rubber footwear from Brazil, and refund, without interest, any estimated countervailing duties collected during the period of suspension liquidation (which commenced on October 29, 1981). Accordingly, it would seem non-rubber footwear from Brazil entered since October 28, 1981 will not be affected by continuing section 751, 19 U.S.C. § 1675(a), administrative reviews.

[2] 19 U.S.C. § 1504(a), (b)(1982) provides:

(a) Liquidation

Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:

(1) The date of entry of such merchandise;
(2) The date of the final withdrawal of all such merchandise covered by a warehouse entry; or
(3) The date of withdrawal from warehouse of such merchandise for consumption where, pursuant to regulations issued under section 1505(a) of this title, duties may be deposited after the filing of an entry or withdrawal from warehouse;

shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer, his consignee, or agent. Notwithstanding section 1500(e) of this title, notice of liquidation need not be given of an entry deemed liquidated.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in regulations, if—

(1) Information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;
(2) Liquidation is suspended as required by statute or court order; or
(3) The importer, consignee, or his agent requests such extension and shows good cause therefor.

[3] 28 U.S.C. § 1581(i) provides:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United State, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) Revenue from imports or tonnage;
(2) Tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) Embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

Continued

§ 1504, and concerns the liquidation of entries subject to a countervailing duty order. Plaintiff declares further that this court should assume jurisdiation in this matter pursuant to 28 U.S.C. § 1581(i), since sections 701–707 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671–1671f (1982) cover assessments of countervailing duties against subsidized imports to the United States.

Defendant contends that a preliminary determination to suspend liquidation of entries pending a section 751 annual review to assess countervailing duties in the liquidation of entries can only be reviewed pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) (Supp. V 1981) when there has been a final administrative determination. Defendant cites *United States* v. *Uniroyal, Inc.*, 69 CCPA —, 687 F.2d 467 (1982), for the proposition that the judicial review provisions of 19 U.S.C. § 1516a (1982) cannot be circumvented by characterizing a challenge to preliminary decisions during the course of a section 751 administrative review of a countervailing duty order as an action to enforce the provisions of 19 U.S.C. § 1504(a), invoking the jurisdiction of the court pursuant to 28 U.S.C. § 1581(i).

The court concludes, for the reasons set forth below, that although subject matter jurisdiction exists under 28 U.S.C. § 1581(i), the action must be dismissed for failure to state grounds under which relief can be granted.

The initial question is whether this court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) enabling it to compel Customs to liquidate merchandise after 1 year from date of entry while a section 751 annual review is in progress.

In *American Air Parcel Forwarding Co.* v. *United States*, 1 CIT 293, 515 F. Supp. 47 (1981), the court, while examining the statutory and regulatory authority of the Customs Service to receive uncertified checks, construed the jurisdictional provisions of the Customs Court Act of 1980 and stated:

> [T]his case comes within the board "residual grant of jurisdictional authority" of this court as described in 28 U.S.C. § 1581(i) * * * In particular, paragraphs (i) (1) and (4) confer jurisdiction over any civil action
>
> "That arises out of any law of the United States providing for—
>
> "(1) Revenue from imports or tonnage
>
> * * * * * * *
>
> "(4) Administration and enforcement with respect to matters referred to in paragraphs (1)–(3) of this subsection * * *"
>
> This court's jurisdiction over plaintiff's cause of action "arises out of [a] law of the United States" * * * and the Cus-

(4) Administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(b) of this section.

> toms Service's administration and enforcement of its regulations.

ID. at 295, 515 F. Supp. at 50.

This analysis is instructive in the matter at hand. The instant case is concerned with laws providing for revenue as well as the administration and enforcement of regulations of the Customs Service.

The difference between *American Air Parcel* and the instant matter is the former construed a statute and regulations concerning the acceptance of uncertified checks while the latter has been presented with statutes to construe, i.e. 19 U.S.C. § 1504 and § 1675 in regard to liquidation and countervailing duty review.

In *United States* v. *Uniroyal, Inc.*, 69 CCPA —, 687 F.2d 467 (1982), the court established that while the jurisdictional grant under 28 U.S.C. § 1581(i) is in addition to the jurisdiction conferred upon this court in subsections (a)–(h) of 28 U.S.C. § 1581, Congress did not intend *generally* that § 1581(i) be used to circumvent subsections (a)–(h) of 28 U.S.C. § 1581.

In the concurring opinion of Judge Nies in *Uniroyal,* which was cited by the majority with approval [4], the notion was expressed.

> [T]he broad subject matter jurisdiction of the court under § 1581(i) may be invoked only when no other remedy is available or the remedies provided under other provisions of 28 U.S.C. § 1581 are manifestly inadequate.

United States v. *Uniroyal, Inc.*, 69 CCPA at —, 687 F.2d at 475 (Nies, J., concurring).[5]

In *Uniroyal,* although the court spoke of jurisdiction, its concern was what administrative and judicial remedies were available and when subsections of 28 U.S.C. § 1581 should be used or invoked in pursuit of those remedies.

Whether or not a complaint states a claim upon which relief may be granted should not be confused with the threshold question of the jurisdiction of the court over the subject matter.

In *Bell* v. *Hood,* 327 U.S. 678 (1946), the Court held subject matter jurisdiction of a court cannot be defeated on the theory that

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[4] The majority stated: "[T]he legislative history of § 1581 further evidences Congress' intention that subsection (i) not be used generally to bypass administrative review by meaningful protest." *United States* v. *Uniroyal, Inc.*, 69 CCPA —, —, 687 F.2d 467, 472 (1982). Further, the majority wrote: "As the concurring opinion indicates, this construction is consistent with pre-1980 precedent from the district courts." *Id.* at — n.15, 687 F.2d at 472 n.15.

[5] Judge Nies noted that prior to the enactment of the Customs Court Act of 1980, Pub. L. No. 96–417, § 201, 94 Stat. 1727, 1728–29, federal courts were consistent in holding that section 1581(i) jurisdiction was available only where the other section 1581 remedies were manifestly inadequate. "The precedent with respect to the *exercise* of jurisdiction by district courts, whose subject matter jurisdiction was transferred to the Court of International Trade by § 1581(i), generally reflects this standard." *United States* v. *Uniroyal, Inc.*, 69 CCPA at — n.9, 687 F.2d at 475 n.9 (Nies, J., concurring) (emphasis added) (citing *United States Cane Sugar Refiners' Ass'n.* v. *Block,* 69 CCPA —, — n.5, 683 F.2d 399, 402 n.5 (1982); *Jerlian Watch Co.* v. *United States Department of Commerce,* 597 F.2d 687, 692 (9th Cir. 1979) (per curiam); *Flinthote Co.* v. *Blumenthal,* 596 F.2d 51, 58 (2d Cir. 1979); *Sneaker Circus, Inc.* v. *Carter,* 566 F.2d 396, 399 (2d Cir. 1977); *Timken Co.* v. *Simon,* 539 F.2d 221, 226 n.7 (D.C. Dir. 1976)). Judge Nies went on to note that simply because "the controversy may not be ripe for review under § 1581(a) does not make the remedy inadequate." *Uniroyal,* 69 CCPA at — n.9, 687 F.2d at 475 n.9 (Nies J., concurring) (citing *J. C. Penney Co.* v. *United States Treasury Department,* 439 F.2d 63, 68 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971)).

the allegations of the plaintiff fail to state grounds upon which relief may be granted. The Court observed:

> [F]ailure to state a proper cause of action calls for a judgment on the merits and not a dismissal for want of [subject matter] jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law, and just as issues of fact, it must be decided *after* and *not before* the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682 (emphasis added).

In *Bush* v. *State Industries Inc.*, 599 F.2d 780 (6th Cir. 1979), the court pointed out that in determining whether a federal court has jurisdiction over the subject matter, it must ascertain whether the case arises under the Constitution or federal statutes and has not been advanced solely to obtain federal jurisdiction. Whether a complaint fails to state a claim upon which relief can be granted is irrelevant to the question of subject matter jurisdiction.

This analysis of federal jurisdiction (under 28 U.S.C. § 1331 (Supp. V 1981) is directly applicable when considering Court of International Trade jurisdiction under section 1581(i). *See American Air Parcel Forwarding Co.*, 1 CIT at 296, 515 F. Supp. at 51. Indeed, just as the plaintiff in *Bell* v. *Hood* was entitled to have his claim heard in federal court because his complaint was "so drawn as to seek recovery" under federal law, so too the plaintiff in the instant case may assert section 1581(i) jurisdiction since the gravamen of the complaint seeks relief which "arises out of" laws relating to "revenue from imports" and "administration and enforcement" with respect to international trade matters. This is so irrespective of any substantive attacks against the complaint.[6]

Having decided that the court has subject matter jurisdiction, it must be determined whether or not the plaintiff's allegations state a claim upon which relief may be granted. The court holds they do not.

Where administrative proceedings are in process, and the agency has not adopted a final decision, the matter is generally not ripe for judicial review. *See Abbott Laboratories* v. *Gardner,* 387 U.S.

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[6] In *PPG Industries, Inc.* v. *United States,* 2 CIT 110, 525 F. Supp. 883 (1981), which predated *Uniroyal,* a case bearing facts quite similar to those in the matter at bar, the plaintiff brought suit challenging the authority of the International Trade Administration to deny a request for a disclosure conference in connection with a section 751 antidumping duty order. The plaintiff asserted jurisdiction under section 1581(i). It was quite clear in *PPG Industries* that the plaintiff was attempting to have the court review a purely interlocutory decision. The court quite correctly deemed this inappropriate and dismissed the action. Notably, however, the dismissal was on the ground that the plaintiff had failed to state a claim as to which relief may be granted. Jurisdiction was presupposed to have existed under section 1581(i). Indeed, in that case the government conceded as much:

> We recognize that this Court has subject matter jurisdiction over claims of the type PPG now brings; we contend, however, that any cause of action PPG may eventually have has not yet accrued and thus may not be maintained at this time.

Defendant's Reply Memorandum at 1-2, *PPG Industries, Inc.* v. *United States,* 2 CIT 110, 525 F. Supp 883 (1981); *see Wear Me Apparel Corp.* v. *United States,* 1 CIT 194, 196, 511 F. Supp. 814, 817 (1981) ("section 1581(i) does not require the filing or denial of a protest as a prerequisite for the exercise of jurisdiction by this court").

136, 148–49 (1967); *Krupp Stahl AG* v. *United States,* 4 CIT 244, 533 F. Supp. 394 (1982). The facts in the instant case indicate that Commerce has not completed the administrative review for the 1980 entries and the possibility exists that the final agency determination may indicate that there were no subsidies, in which event the plaintiff would presumably find no reason to complain. In the interest of efficient agency action, interlocutory determinations should not be considered when final agency decisions are judicially reviewable. *See PPG Industries, Inc.* v. *United States,* 2 CIT 110, 112, 525 F. Supp. 883, 884–85 (1981).

Plaintiff, alleging irreparable harm, has requested preliminary injunctive relief. The court denies such relief for the reasons assigned below.

The relevent factors for determining whether or not an injunction should issue were set out in *S. J. Stiles Associates Ltd.* v. *Snyder,* 68 CCPA 27, 646 F.2d 522 (1981):

> (1) A threat of immediate irreparable harm; (2) that the public interest would be better served by issuing than by denying the injunction; (3) a likelihood of success on the merits; and (4) that the balance of hardship on the parties favored [movant].

Id. at 30, 646 F.2d at 525.

In *American Air Parcel, supra,* the court pointed out that although the plaintiff bears the burden of persuasion, the movant is not required to sustain the high burden of proof as to each of the four factors. The balance of hardship test permits the court flexibility and sound discretion in applying the four factors in granting or denying a request for preliminary injuctive relief. 1 CIT at 298, 515 F. Supp. at 52.

Plaintiff contends its members will be irreparably harmed if Commerce completes its administrative review for the 1980 entries and continues its 1981 review, arguing its members have already sold merchandise included in the 1980 entries and will further be forced to endure business uncertainty occasioned by contingent and unknown economic and tax liabilities. This court cannot agree that this harm complained of is of the magnitude contemplated for the issuance of a preliminary injunction. This court does not find plaintiff will suffer irreparable harm by awaiting the final agency determination.

Furthermore, judicial review must properly await final determination when the issues are ripe. *Abbott Laboratories,* 387 U.S. at 148–49; *Krupp Stahl AG,* 4 CIT 244, 553 F. Supp. 394.

The Court now turns to plaintiff's request for a writ of mandamus. The court finds the application inappropriate and premature. Mandamus is an extraordinary remedy and should be employed only when necessary and when no meaningful alternatives are available. *Canadian Tarpoly Co.* v. *United States International*

Trade Commission, 68 CCPA 121, 123, 640 F.2d 1322, 132 (1981). In this case, plaintiff must await the final determination to find relief.

It is, therefore, ordered and adjudged:

1. Plaintiff's application for a writ of mandamus is denied;

2. Plaintiff's application for a preliminary injunction to enjoin the Secretary of Commerce from issuing a final determination in the section 751 administrative review of the countervailing duty order covering January 4, 1980 through December 31, 1980 entries of certain non-rubber footwear from Brazil is denied;

3. Plaintiff's application to enjoin the Secretary of Commerce from directing the United States Customs Service to assess any countervailing duties on those entries greater than the amount already deposited with Customs as estimated countervailing duties is denied;

4. Plaintiff's application for a preliminary injunction to enjoin the Secretary of Commerce from conducting an administrative review of January 1, 1981 through September 11, 1981 entries of non-rubber footwear from Brazil covered by an outstanding countervailing duty order is denied;

5. Defendant's cross-motion to dismiss for failure to state a claim as to which relief may be granted is granted.

It is so ordered.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *November 23, 1983.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary here given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/368	Rao, J. November 18, 1983	Susan Gail Handbags, Inc. et al.	77-8-01460, etc.	Item 656.25 Various rates	Item 745.68 Various rates	Agreed statement of facts	New York Metal handbag hardware articles
P83/369	Ford, J. November 18, 1983	Uniroyal, Inc.	80-10-01676, etc.	Items 680.12, 680.15 and 678.35 5.5%	Item 680.11 Free of duty	Converse Rubber v. U.S. (C.D. 4374)	Bridgeport (Boston); New York Shoe machinery molds

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/370	Newman, J. November 18, 1983	Mundex Metals Corporation	78-10-01833	Item 609.86 8.5%	Item 609.82 .1¢ per lb. + 2% plus additional duties on alloy content	Philipp Overseas, Inc. v. U.S. (C.D. 4859) aff'd, U.S. v. Philipp Overseas, Inc. C.A.D. 1263	Boston Hot rolled, annealed and pickled stainless steel angles
P83/371	Newman, J. November 18, 1983	Texas Instruments Incorporated	81-6-00750, etc.	Item 685.90 8.1% or 7.7%	Item 687.58 5.8% Item 687.75 5.6%	U.S. v. Kyocera International, Inc. No. 82-6, 6/24/82	Dallas-Ft. Worth (Houston); Honolulu Lead frames
P83/372	Rao, J. November 21, 1983	Niki-Lu Industries, Inc.	78-10-01819	Item 807.00 No duty allowance for domestic components which had been subject to buttonhole operation incidental to assembly operation	Item 807.00 Duty allowance for components which had been subject to buttonhole operation	U.S. v. Mast Industries, Inc. No. 81-18, 12/30/81	Miami Wearing apparel
P83/373	Boe, J. November 21, 1983	Litronix, Inc.	81-8-01048	Item 716.15 or 716.05 75¢ each	Item 688.36 5.5%	U.S. v. Texas Instruments, Inc. No. 81-23, 3/25/82	San Francisco Watch modules
P83/365	Rao, J. November 17, 1983	F. W. Woolworth & Co.	83-6-00853	Item 379.23 40.4%	Item 379.89 20¢ per lb. + 32.1%	Agreed statement of facts	Houston Men's or boy's jogging shorts
P83/366	Watson, J. November 17, 1983	Lawrence M. Parry, Jr. CHB a/c Magic Chef, Inc.	78-4-00604	Item 807.00 Duty assessed to extent applicable under item 711.84 at rate of 7%	Item 684.30 4% except as to those parts that were classified under item 807.00 which are properly entitled to duty-free allowance	Harper Wyman Co. v. U.S. 1 CIT 108 (1981)	Chattanooga (New Orleans) Electric thermostats

P83/367	Boe J. November 17, 1983	Elbe Products Corp.	82-8-01195	Item 359.50 30% + 25¢ per lb. Item 355.25 15% + 12¢ per lb. Item 355.82 15% + 12.5¢ per lb. Items 355.65, 774.60 and 774.55 8.5%	Item 771.42 6%	U.S. v. Elbe Products Corp. C.A.D. 1267	New York Synthetic leather
P83/374	Rao, J. November 23, 1983	Niki-Lu Industries, Inc.	78-11-01984	Item 807.00 No duty allowance for domestic components which had been subject to buttonhole operation incidental to assembly operation	Item 807.00 Duty allowance for components which had been subject to buttonhole operation	U.S. v. Mast Industries, Inc. No. 81-18, 12/30/81	Miami Wearing apparel
P83/375	Boe, J. November 23, 1983	Litronix, Inc.	81-3-00241	Items 716.10 through 716.16 Various rates	Item 688.36 5.5% (modules) Item 685.70 4% (watch displays)	U.S. v. Texas Instruments, Inc. No. 81-23, 3/25/82 (modules) U.S. v. Texas Instruments, Inc. C.A.D. 1243 (watch displays)	San Francisco Watch modules and watch displays

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/711	Re, C.J. November 18, 1983	C. Itoh & Co. (America) Inc.	77-8-01959, etc.	Export value (entries listed on attached schedule with suffix "A") United States (entries listed on attached schedule with suffixes "D" and "E")	Appraised values shown on entry papers less additions included to reflect currency revaluation (entries listed with suffix "A") Landed duty paid price less statutory deductions for general expenses and profit in an amount of 11.72% thereof less freight, insurance and duty, provided that said deductions do not result in an appraised value below f.o.b. invoiced values, less additions included to reflect currency revaluation (entries listed with suffix "D")	C.B.S. Imports Corp. v. U.S. (C.D. 4739) (entries listed with suffix "A") Agreed statement of facts (entries listed with suffixes "D" and "E")	New York Not stated (entries listed with suffix "A") Synthetic textiles (entries listed suffixes "D" and "E")

					Landed duty paid price less statutory deductions for general expenses and profit in amount of 11.72% thereof less freight, insurance and duty, provided said deductions do not result in an appraised value below f.o.b. invoice values (entries listed with suffix "E")		
R83/712	Re, C.J. November 18, 1983	Haruta & Co., Inc.	79-3-00550	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/713	Re, C.J. November 18, 1983	World Famous Sales Co.	73-8-02434	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago; New York Not stated
R83/714	Landis, J. November 23, 1983	Holly Stores, Inc.	76-4-00978	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R83/715	Landis, J. November 23, 1983	Petrie Stores Corp.	75-11-02816	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R83/716	Landis, J. November 23, 1983	Regal Accessories, Inc.	77-11-04778	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel
R83/717	Landis, J. November 23, 1983	Regal of California, Inc.	77-12-04842	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Wearing apparel

Appeal to U.S. Court of Appeals for the Federal Circuit

APPEAL No. 84-605—United States Steel Corp./Republic Steel Corp., et al. v. United States—COUNTERVAILING DUTY PROCEEDINGS—TERMINATION OF COUNTERVAILING DUTY CLAIMS—PRELIMINARY DETERMINATIONS, Appeal from Slip Op. 83-101, Filed November 3, 1983

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U.S. Customs Service

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C. 20229

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

POSTAGE AND FEES PAID
DEPARTMENT OF THE TREASURY (CUSTOMS)
(TREAS. 552)

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* UNIV MICROFILMS INTL
* 300 N ZEEB RD
* ANN ARBOR MI 48106